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Kevin Hsueh, Chief  
Environmental Review Branch  
Division of Waste Management  
and Environmental Protection  
Office of Federal and State Materials  
and Environmental Management Programs

February 20, 2013

Dear Mr. Hsueh,

The Standing Rock Sioux Tribe THPO (SRST-THPO) is in receipt of the Nuclear Regulatory Commission's (NRC) letter dated February 08, 2013 regarding the Dewey-Burdock in-situ recovery project and the proposal for tribes to basically just walk around the proposed license boundary and not actually conduct a proper survey of the area. The SRST-THPO offers the following comments for this latest failure of your agency's ability to conduct good faith consultation and identification efforts. I understand that this process is frustrating for your agency given that your agency is essentially new to the 106 process even though the law has been in place since 1966. However, it is far more frustrating for the tribes who have major concerns with the direct and indirect impacts this project will have to our historic properties of significance and to our cultural and spiritual connections to those sites. These comments are not restricted to Dewey-Burdock, the SRST-THPO is fully aware that a similar proposal occurred for the Crow Butte facility and that it is being considered for the proposed Ross Uranium facility so please file these comments with all three projects.

First and foremost, your agency is required per 386CFR800.1 (c) to complete your section 106 compliance prior to any permit being issued. Your agency does not seem to understand this section at all. To be specifically clear on this; your agency and not the applicant, must fulfill Section 106 compliance as there has been a lot of confusion on this subject from your agency (please see letters from Sept and August of 2011). There are really only two options for your agency:

- your agency completes compliance with Section 106 and issue your permit or,
- your agency does not complete compliance with Section 106 and no permit can be issued.

The second option never seems to be brought up as it is obviously the least desirable of the two. There has been no compliance with Section 106 thus far in terms of even the identification of historic properties of significance to tribes and this latest proposal does very little to address this as will be explained later. The SRST-THPO will address this second option as it pertains to funding of the identification efforts further in this response.

Your agency has established a self-imposed deadline of May 2013 to issue your permit, however, according to Federal law you actually cannot issue this permit without completing your compliance with Section 106. There is no way your office can issue a permit with your self-imposed deadline of May 2013 and keep to the schedule you have outlined in your latest "proposal".

This latest proposal is, once again, tailored to only conform to fiscal restraints by the applicant and does not actually fulfill your agencies responsibilities to conduct proper identification efforts. The SRST-THPO has mentioned in previous letters (November 20, 2012) that it appears that everything for this project is tailored around the applicants' expense account. This current proposal is no different.

This current proposal is severely deficient in numerous ways. I have talked with the Advisory Council for Historic Preservation (ACHP) and State Historic Preservation Office (SHPO) about this proposal. I framed the discussion as if this proposal for a methodological framework were followed to conduct an archaeological survey. According to your current proposal to the tribes, you would ask various archaeological companies (up to 23 based on current consulting tribes to keep things fair and balanced) to accept a ten thousand dollar honorarium to each send up to three representatives to walk around the proposed undertakings license boundary for anywhere from one day to thirty days. There would be no specific methodology as to what was needed to be recorded or how and with no direction or real accountability as to how they conduct themselves in the field or where they conduct their field studies. The only requirement is that they submit a written report of what they found to NRC and somehow that will fulfill the identification efforts per 36CFR800.4. This would, in no way, shape or form fulfill the responsibilities for identification for archaeological sites within the Section 106 process. There is absolutely no way that any SHPO would accept this from an archaeological report yet you are asking the tribes to accept this methodology for their identification efforts. Your actions based on this current proposal are arbitrary and capricious.

This current proposal was issued with no tribal input that I am aware of. This can be said for the Crow Butte proposal as well. It is strictly the federal agencies ideas of what they believe will achieve a good faith effort at identification. It has been over a year since we last talked face to face apart from a quickie meeting tacked on to another meeting in Bismarck, ND. I urge the federal agency to begin face to face discussions with the consulting tribes including the tribes who recently joined the consultations efforts concerning these issues once again and not to continue with these ill-advised solo efforts.

Your agency is proposing that an honorarium from the applicant be given to each tribe in the amount of ten thousand dollars to essentially fund the activities of three individuals for a total of 30 days.  $10,000/3=3,333$ . So each individual would get 3,333. Dividing that by the number of days would equal  $3,333/30=111.1$  per day divide that by an 8 hour work day = 13.88 an hour. We previously rejected quotes of 25 dollars an hour that were submitted by the applicants scope of work and budget due to it being far too low compared to what tribal monitors make on the Great Plains and you now expect us to accept half of that? Hopefully, you will begin to see just how extremely deficient this current proposal is. As for any counter proposal that it could be used to fund only one individual, please don't bother. There is no way adequate identification and recording efforts could be completed as you proposed by one individual from each tribe who elects to participate in this manner. I also have serious doubts that three individuals with no direction could adequately complete what is required either. I am basing this statement entirely on the fact that I have visited the project area twice to "get a feel" for the density of sites in the area. The site density is high based upon my observations of unrecorded sites currently in the project area. This was confirmed by tribal representatives in the field during the June, 2011 meeting and again in consultation with Ben Rhodd while in the field with him on this project in May 2012. This

will require a considerable investment of time for identification and recording. This investment of time would be longer than is allowed within this current proposal.

Apparently the applicants fixed dollar amount of 100,000 is not as fixed as they make it sound. The current proposal, if all 23 consulting tribes were to accept ten thousand dollars, would cost 230,000 in honorariums alone. An additional 258,750 dollars in per diem plus an additional 15-20,000 in mileage costs would also be added to this total. This amounts to a little over 500,000 dollars that the applicant would be committing to this project. This, from my understanding, is still shy of the quote that was sent in by Makoche Wowapi, however, it is a lot more in the ball park of what an actual survey should cost but certainly far below what is necessary for the entire license boundary. I am also fully aware that the applicant apparently does not expect all of the tribes to accept this proposal or to accept the honorarium at any rate and by doing so they are likely going to save money on even the initial 100,000 fixed amount if not enough tribes agree. However, would a good faith effort be met by one or two tribes accepting this money? I respectfully submit that it would not. This current proposal is just short of a bribe disguised as a token identification effort. It calls into question the entire integrity of the 106 process.

If the applicant is unwilling to fund a proper survey for historic properties of significance to tribes, the federal agency cannot complete its Section 106 responsibilities and compliance and therefore no permit can be issued for this project. As I mentioned previously, this is never a consideration for the federal agency. It is considered along the same line as the no-action alternative within the NEPA process, in that it is there because it is required, however, it is subsequently ignored. The mandate at 36CFR800.1 (c) does not allow you to ignore this. As mentioned previously, you only have two options when it comes to Section 106.

The only good aspect that I have seen within the current proposal is that the NRC has apparently, finally, realized after almost two years of discussions that the undertaking is the entire license boundary and is not restricted to the area of direct effects. There is hope for your agency after all, unfortunately however, not under the auspices of the current proposal.

Once again, this amounts to another ultimatum that the tribes cannot and should not accept. There is no way any research conducted in this manner would be accepted for an archaeological survey by SHPO and we as THPO's should not accept it as being acceptable to conduct identification efforts for our sites of significance. Sites of significance that we know, for a fact, are within this projects license boundary.

A proper TCP survey following identification methods analogous to an archaeological survey that SRST-THPO together with other Tribes have endorsed has not been taken seriously and dismissed as cost-prohibitive. The fact that the applicant underestimated the amount of people, time and money required to meet this level of effort is not a reason to abandon identification efforts. NRC cannot walk away from their responsibility based on the applicants dream budget or schedule and claim to be working in good faith. Once again, we encourage the NRC to conduct proper identification efforts and not this current failure of a proposal.

Sincerely,  
STANDING ROCK SIOUX TRIBE



Terry Clouthier  
Tribal Archaeologist